FILED
United States Court of Appeals
Tenth Circuit

September 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANTHONY CASTILLO SANCHEZ,

Petitioner - Appellant,

v.

CHRISTE QUICK, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

No. 23-6132
(D.C. No. 5:10-CV-01171-HE)
(W.D. Okla.)

In re: ANTHONY CASTILLO SANCHEZ,

Movant.

No. 23-6137
(D.C. No. 5:10-CV-01171-HE)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **MORITZ**, and **EID**, Circuit Judges.

Anthony Castillo Sanchez, an Oklahoma prisoner represented by counsel, was convicted of first-degree murder and is scheduled to be executed by the State of Oklahoma on Thursday, September 21, 2023. In the district court, he filed a motion

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

to stay the execution so his new attorney (who entered his appearance on August 22) could have time to go through boxes of materials accumulated by his previous attorneys. The district court denied that motion on September 13 and Sanchez appealed. That became No. 23-6132.

The parties agreed to a highly expedited schedule for merits briefing: Sanchez would file his opening brief no later than Saturday, September 16; Oklahoma would file its response brief no later than Sunday, September 17; and no reply brief would be filed unless called for by the court.

Sanchez filed nothing on September 16, but instead filed what purports to be an opening brief just before 8:00 a.m. (MDT) on September 17. In the interest of justice, we will overlook his tardiness. We note, however, that his opening brief is more in the nature of a motion for stay of execution rather than an argument that the district court erred.

Later on the morning of September 17, Sanchez filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 petition, claiming new evidence that his deceased father was the real killer. That became No. 23-6137. He also filed, in that same proceeding, a motion for stay of execution.

We have received responses from Oklahoma on all of these matters. For the reasons explained below: (i) in No. 23-6137, we deny authorization to file a successive § 2254 petition and we deny the stay motion; and (ii) in No. 23-6132, we deny any motion Sanchez may have intended to bring through the opening brief, and we affirm the district court's ruling.

I. BACKGROUND & PROCEDURAL HISTORY

A. The Crime & Investigation

In December 1996, University of Oklahoma ballet student Juli Busken went missing and was soon found dead at the edge of a lake, having been shot in the back of the head with a .22 caliber bullet. Evidence on her body and at the crime scene suggested vaginal and anal rape. The police recovered human sperm from Busken's panties and from a leotard discarded near the body, from which they were able to develop a DNA profile of an unknown person. They also photographed two sets of shoe prints leading toward the lake and one set leading away. When they found Busken's car, certain items were missing, including her cell phone.

Police located an eyewitness, Janice Keller, who claimed to have seen Busken on the morning of the day she disappeared. Keller said Busken was in the passenger seat of a car matching the description of Busken's car, and the car was being driven by an angry-looking male, whom Keller thought to be twenty-five or thirty years old. Keller helped to produce a composite sketch of the suspect.

Police located another eyewitness, David Kill, who was cut off in traffic that same morning by a car matching the description of Busken's car. This happened near the lake where Busken's body was found. Kill saw only one occupant in the car (the driver, a young male) and he followed the car for a while because he was angry about being cut off. He also helped to develop a composite sketch of the suspect.

B. The Prosecution & Later Proceedings

Busken's murder became a cold case. In 2002, however, Sanchez began serving an Oklahoma prison sentence for an unrelated burglary. As part of that sentence, he was required to submit a DNA sample to a state database. Two years later, an investigator discovered that the DNA recovered from the crime scene appeared to match the DNA collected from Sanchez.

The state obtained new DNA samples from Sanchez, which again matched the DNA recovered from the crime scene. According to the state's DNA expert, the statistical likelihood that the crime-scene DNA belonged to someone other than Sanchez was vanishingly small.

Oklahoma charged Sanchez with first-degree murder, first-degree rape, and forcible sodomy. The principal evidence against Sanchez was as follows:

- The DNA recovered from seminal fluid on Busken's panties and leotard was a near-certain match with Sanchez's DNA.
- According to Sanchez's girlfriend at the time of the murder: (i) Sanchez then lived about a mile away from Busken's apartment; and (ii) he owned a particular type of Nike shoe with a tread pattern matching the tread pattern of the shoe prints leading away from the crime scene.
- Also according to the girlfriend, Sanchez and his stepfather had some sort of argument in their apartment (the same apartment about a mile away from Busken's). The girlfriend, who was in another room at the time, heard one of them shoot a gun. Based on the girlfriend's account,

police obtained a warrant to dismantle the wall of the apartment, from which they discovered a bullet of the same caliber, and with the same ballistic markings, as the bullet recovered from Busken's skull.

- According to one of Sanchez's friends, Sanchez owned, at least as of 1994 or 1995, either a .22 caliber or .25 caliber gun.
- About thirty hours after the murder, Busken's cell phone was used to call a few different numbers, including the number of one of Sanchez's former girlfriends.

Sanchez did not present a defense case. A jury convicted on all charges and, after the penalty phase, sentenced Sanchez to death for the murder.

On direct appeal to the Oklahoma Court of Criminal Appeals (OCCA), Sanchez challenged the sufficiency of the evidence to convict him of murder and rape.[1] He pointed to the following exculpatory evidence:

- None of the fingerprints recovered from inside Busken's car matched his own.
- He had just turned eighteen years old at the time of the murder, but Keller's eyewitness account was that the driver was twenty-five to thirty years old, and the composite sketch produced from Keller's recollections shows someone apparently older than Sanchez and similar in appearance to Sanchez's father.

[1] He did not challenge the sodomy conviction.

- Keller saw Busken and the suspect in Busken's car only thirty minutes before Kill saw the suspect alone in Busken's car, and this supposedly tight timeframe meant that, in Sanchez's view, more than one person was probably involved. "His arguments on appeal . . . at one point seemingly implicat[ed] his own father in the killing." *Sanchez v. State*, 223 P.3d 980, 1013 (Okla. Crim. App. 2009).

The OCCA rejected Sanchez's sufficiency-of-the-evidence challenge, *id.* at 1002, and affirmed in all other respects, *id.* at 1014.

Sanchez's conviction and sentence have since been examined and left undisturbed by:

- a state postconviction proceeding, *see Sanchez v. State*, No. PCD-2006-1011 (Okla. Crim. App. Apr. 19, 2010) (unpublished);
- a § 2254 petition, *see Sanchez v. Trammell*, No. CIV-10-1171-HE, 2015 WL 672447 (W.D. Okla. Feb. 17, 2015);
- a COA proceeding in this court, *see Sanchez v. Warrior*, 636 F. App'x 971 (10th Cir. 2016);
- a motion for authorization to bring a second § 2254 petition, raising issues unrelated to those discussed in this order, *see In re Sanchez*, No. 17-6014 (10th Cir. Feb. 13, 2017) (unpublished); and
- at least one other state postconviction proceeding, which rejected Sanchez's claim for relief based on new evidence that his father was the

real killer, *see Sanchez v. State*, No. PCD-2023-95 (Okla. Crim. App. Apr. 13, 2023) (unpublished) (available at Aplee. App. (No. 23-6132) at 31).

C. Recent Proceedings

From 2010 (when Sanchez filed his original § 2254 petition) until just recently, Sanchez was represented by Mark Barrett and Randall Coyne. On May 18, 2023, attorney Eric Allen filed a motion asking the district court to substitute him as counsel. Allen alleged a breakdown in communications between Sanchez and his then-lawyers, Barrett and Coyne. Allen also filed a motion asking the court to substitute him as counsel for a soon-approaching clemency hearing.

The district court held a hearing on June 6 and denied both motions, explaining that Sanchez's allegation that Barrett and Coyne had not contacted him for six years was untrue, and that Sanchez's statements to the contrary

> reflect pressure and coaching from his nominal "spiritual advisor," Mr. Jeff Hood, which is consistent with Mr. Hood's efforts in other cases to inject himself into the relationships between capital defendants and their counsel and that such efforts are motivated, at least in part, by considerations other than the best interest of the client.

Aplee. App. (No. 23-6132) at 5–6.

On June 15, Sanchez filed a pro se motion seeking to proceed pro se, and a second motion waiving his right to a clemency hearing (the clemency hearing was the most recent proceeding for which Barrett and Coyne had been appointed). On July 17, Barrett and Coyne filed a motion to withdraw, observing that they had been

appointed for the clemency hearing but Sanchez wanted to waive the hearing. They also filed a motion for direction on what to do with numerous boxes of materials they had amassed. We will refer to these boxes as the "case files." Barrett and Coyne described the case files as follows:

> The files associated with Mr. Sanchez's case consist of over forty (40) bankers boxes of papers. Approximately twelve (12) of those boxes are sealed or semi-sealed (the tape has worn off of some) papers which prior counsel said represent the totality of what trial counsel handed over to subsequent counsel within the Indigent Defense System. Duplicates of these files are said to exist in the other slightly over thirty boxes. Many of the files contain interviews conducted by the Oklahoma City Police Department in which the police obtained, and included in the report, the social security numbers of the interviewees. There are many such interviews and the social security number has not been blacked out on any of them. Almost all of these interviews, and scores of others conducted by law enforcement and conducted by [Sanchez's] representatives, contain either birthdates or home addresses or both. Hundreds of pages contain jury information, this category being amplified by the fact that this case was remanded [during the direct appeal to the OCCA] for a hearing to determine if jurors saw [the leg-irons Sanchez was required to wear during trial]. Other documents contain reports which were not used at trial which contain incriminating or potentially incriminating information against Mr. Sanchez.

Aplt. App. (No. 23-6132) at 2–3. Barrett and Coyne noted that Sanchez wanted to take possession of the documents "in a pro se effort to prove his innocence," but they did not believe he had any right to possess case files other than a trial transcript. *Id.* at 3. They requested an order that, "for the present, the documents to be provided to Mr. Sanchez shall consist of the trial transcript." *Id.* at 5.

On August 7, the district court granted the motion to withdraw and Sanchez therefore became unrepresented. The district court also granted the motion about disposition of the case files "[s]ubstantially for the reasons stated in the motion." *Id.* at 9.

On August 22, Allen entered an appearance for Sanchez. Allen did not file a new motion seeking access to the case files. Rather, on August 30, Allen filed, on Sanchez's behalf, a notice of appeal from the district court's August 7 order that Barrett and Coyne retain the case files.

This court remanded for a limited purpose—allowing the district court to reconsider the August 7 order in light of Allen's appearance. Sanchez then filed (in district court) an opposed motion for stay of execution pending decision about possession of the case files. He argued he was likely to succeed in establishing that the case files should be turned over to him.

On September 13, the district court held a hearing. It said it would enter an order vacating its previous order telling Barrett and Coyne to hold onto the case files, and it would instead direct them to turn the files over to Allen. At that point in the hearing, Allen requested a stay of execution so he could have time to go through the boxes. The district court denied that request, reasoning:

- it probably did not have jurisdiction because there was no pending § 2254 proceeding (and this court would have to authorize such a proceeding anyway); and

- even if the district court could exercise jurisdiction, it would deny the motion for failure to show any likelihood of success on the merits.

Later that day, the district court entered an order consistent with its statements at the hearing. Sanchez then dismissed his appeal challenging the disposition of the case files and he filed a new appeal from the district court's order denying his stay motion (No. 23-6132). As noted, he has also since filed a motion for authorization to file a successive § 2254 petition (No. 23-6137).

II. MOTION FOR AUTHORIZATION (No. 23-6137)

We will first address the motion for authorization because it informs our analysis of the remaining matters.

Sanchez relies on a report from his father's ex-girlfriend that his father was frequently abusive. She says he threatened to rape and kill her like he raped and killed Buskin if she reported the abuse. The threats deterred her from coming forward sooner. After the father committed suicide, she no long feared coming forward.

Sanchez relies on the foregoing to assert a freestanding actual-innocence claim. He does not claim the investigation, prosecution, or court proceedings violated the Constitution. Instead, he claims his execution would do so because he is factually innocent.

A. Statutory Standard

To obtain authorization from this court to file a successive § 2254 petition, Sanchez must make a prima facie showing that

> (A) . . . the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2); *see also id.* § 2244(b)(3)(C) (establishing that the movant's burden at this phase is to "make[] a prima facie showing that the [proposed second or successive] application satisfies the [foregoing] requirements").

B. Analysis

Sanchez has not made the requisite prima facie showing.

1. § 2244(b)(2)(A) – New Rule of Constitutional Law

Sanchez has not identified a new rule of constitutional law that would support his actual-innocence claim. Indeed, the Supreme Court has explicitly declined to recognize whether a habeas petitioner can "assert[] [a] federal constitutional right to be released upon proof of 'actual innocence,'" stating that whether there is such a right to a freestanding actual-innocence claim is an "open question." *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009). Thus, Sanchez has not made a prima facie showing of "a new rule . . . made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2244(b)(2)(A).

2. § 2244(b)(2)(B) – Newly Discovered Evidence

We may not authorize a successive habeas petition based on new evidence unless "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, *but for constitutional error*, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii) (emphasis added). Thus, "subparagraph (B)(ii) requires the applicant to identify a constitutional violation and show that he would not have been found guilty 'but for' the violation." *Case v. Hatch*, 731 F.3d 1015, 1032 (10th Cir. 2013). Sanchez does not identify any such constitutional error.

C. No "Clear and Convincing Evidence," or "Extraordinarily High [Showing]," of Actual Innocence

Even if we could ignore § 2244(b)(2)(B)(ii)'s "but for constitutional error" requirement, Sanchez would still need to offer "clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense" in light of the evidence as a whole. In a similar vein, the Supreme Court has stated that if a right to habeas relief exists based on actual innocence alone (without an underlying constitutional error), "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Sanchez makes neither showing.

The only evidence the jury did not hear is the ex-girlfriend's assertion that Sanchez's father, now deceased, claimed to have raped and killed Busken as a means

of adding credibility to his threats. Even if the ex-girlfriend's assertion that Sanchez's deceased father claimed to have raped and killed Busken could survive a hearsay objection,[2] it cannot overcome the incriminating evidence, especially the DNA.

Sanchez has long attempted to implicate his father, but, as the district court correctly stated when denying Sanchez's first § 2254 petition, this argument

> is contrary to the expert evidence presented at trial that [Sanchez] and his father would not have the exact same DNA. Moreover, . . . [Sanchez's] DNA matched the DNA extracted from two semen deposits (Ms. Busken's panties and her ballet leotard) at every one of the sixteen genetic loci tested. This was a near certain match.

2015 WL 672447, at *22. And as this court stated in denying a certificate of appealability on sufficiency of the evidence:

> Mr. Sanchez cannot overcome the DNA evidence from sperm found on the victim's clothing linking him to the crimes. He has not impeached that evidence, including the expert's testimony that his DNA would have common alleles with his father, the only person Mr. Sanchez points to as a possible alternative perpetrator in the case, but that their DNA would not be the same. The corroborating evidence of Mr. Sanchez's shoeprints at the murder scene and the call from the victim's cell phone to Mr. Sanchez's ex-girlfriend the day following the crimes undermines any suggestion, which is implausible in the first place, that his DNA was planted on the victim.

Sanchez v. Warrior, 636 F. App'x at 974–75.

[2] In the postconviction application resolved earlier this year, the OCCA concluded the ex-girlfriend's statements would not be admissible under the Oklahoma Evidence Code. *See* Aplee. Suppl. App. (No. 23-6132) at 43–44.

The ex-girlfriend's story, combined with the lack of Sanchez's fingerprints in Busken's car, the estimated age given by one of the eyewitnesses and her composite sketch, and the timeframe provided by the eyewitnesses, pales in comparison with the DNA and other inculpatory evidence, including the proximity of Sanchez's apartment to Busken's, the shoe prints, the cell phone call, the bullet found at his apartment, and gun ownership. He simply has not and cannot make the "extraordinarily high" or "clear and convincing" showing for us to authorize a habeas claim based on actual innocence.[3]

* * *

For all these reasons, we may not authorize a successive habeas petition based on the ex-girlfriend's assertion that Sanchez's father claimed credit for killing Busken.

D. Stay Motion

Along with his motion for authorization, Sanchez filed a motion for stay of execution. Because we deny authorization, we deny that motion as moot.

[3] Oklahoma has submitted an Oklahoma State Bureau of Investigation forensic report dated February 22, 2023, comparing a sample of Sanchez's father's DNA to the DNA found at the crime scene. Oklahoma requested this report in response to Sanchez's postconviction application filed with the OCCA earlier this year, in which he sought relief based on his father's ex-girlfriend's claims. Sanchez has not mentioned this report in any of his filings under review. The report concluded that (1) Sanchez's father's DNA does not match the DNA found at the crime scene, but (2) there is a 99.9% chance that Sanchez's father is the father of the person who contributed the DNA recovered from the sperm found on Busken's leotard. *See* Aplee. Suppl. App. (No. 23-6132) at 52.

III. MERITS OF THE APPEAL REGARDING THE CASE FILES (No. 23-6132)

As we recounted above, the district court gave Allen (Sanchez's new attorney) access to prior counsel's case files as of September 13. Upon announcing that order, Allen made an oral motion for a stay of execution to give him time to review those files, in hopes of finding a basis for habeas relief. The district court denied that motion because it believed it did not have jurisdiction to issue a stay if there was no pending habeas proceeding. Alternatively, it stated it would deny a stay on the merits because Sanchez's argument was entirely speculative and there was no reason to conclude Allen would find anything important in the case files.

We will first discuss the district court's jurisdiction, and then its alternative ruling.

A. Jurisdiction

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Sanchez did not tell the district court, and he does not tell us, which of these three options applies to justify an injunction solely to give new counsel time to go through old counsel's case files. Nor does he argue that some exception to § 2283 might apply. Indeed, Sanchez ignores the district court's jurisdictional ruling.

The only authority of which we are aware that has any resemblance to this situation—and we again emphasize that Sanchez has not raised this argument—is 28 U.S.C. § 2251(a)(3), which states:

> If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

This is not Sanchez's situation because he is not applying for counsel under 18 U.S.C. § 3599, nor was Allen appointed under § 3599. In any event, § 2251(a)(3) is permissive ("*may* stay execution of the sentence of death"), not mandatory, and we know the district court would have denied the stay on its merits, whatever the jurisdictional basis. We therefore turn to that alternative ruling.

B. Alternative Denial on the Merits

Inmates seeking a stay of execution "must satisfy all of the [usual] requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). We review a district court's refusal to grant a stay of execution for abuse of discretion. *See Warner v. Gross*, 776 F.3d 721, 727 (10th Cir. 2015).

The district court reasoned as follows when denying Sanchez's stay request:

> It seems to me that, at most, all you can surmise from these issues relating to access to the records and the recent entry of counsel into the case is essentially a request saying we've got new counsel; therefore, we'd like to start over

> looking at everything again and see if we can find something.
>
> Well, we're well past the point where simply looking to try to find something is any basis for—any basis for stay. I mean, this case has been the subject of, what, 15 or 20 years' worth of litigation on all issues, and the law certainly does not contemplate that you simply start over just because somebody gets a new lawyer in the case.
>
> So it seems to me that anything beyond—or the only suggestions that have been offered here of anything is pure speculation as to what looking at the files might show, and I think there is—that is, as I say, speculation based on all that's gone before.
>
> I have zero reason to think there is any stone yet to be turned over that has not already been turned over. But, in any event, there has been no showing here of a significant possibility of success on the merits.

Tr. of Sept. 13, 2023 Hr'g at 17, Sanchez v. Quick, No. CIV-10-1171-HE (W.D. Okla. Sept. 14, 2023), ECF No. 106.[4]

This was not an abuse of discretion. Sanchez has never given any hint about what he thinks he might find in his previous counsel's case files—much less anything that might satisfy the standard for a second or successive § 2254 petition. He does not even invoke his theory about his father to justify extra time to search these files.

The district court also properly considered the timing of Sanchez's request. "A stay is an equitable remedy, and [in the death penalty context] equity must take into consideration the State's strong interest in proceeding with its judgment and attempts at manipulation." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (internal

[4] This document was not included in the appellate record. We take judicial notice of it. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

quotation marks, brackets, and ellipses omitted). The sequence of events here—an eleventh-hour attorney substitution and then a need to review previous counsel's files—shows significant potential for manipulation.

Moreover, other than noting that some of the boxes containing the case files are "sealed," Sanchez has not argued that his previous attorneys (including Barrett and Coyne and any before them) failed to review these files or failed to consider any arguments on behalf of Sanchez based on their contents.

Sanchez at times implies the district court is at fault for creating a time crunch. For example, Sanchez points out that Barrett and Coyne first moved for directions on what to do with the case files on July 17 (stating that Sanchez wanted the files so he could try to support his claim of innocence), but the district court did not rule on that motion until August 7, when it ordered Barrett and Coyne to keep the files pending further order.

We will not entertain any argument that the August 7 order was erroneous. Sanchez has dismissed that appeal.

* * *

In sum, we agree with the district court that it did not have jurisdiction to enter a stay of execution in these circumstances. And, if it did have jurisdiction, it did not abuse its discretion when it denied a stay.[5]

[5] Sanchez's opening brief in No. 23-6132 is framed mostly as a request to grant the stay that the district court denied, rather than as an argument that the district court erred. To the extent that was Sanchez's true intent—to move *this court* for a

IV. CONCLUSION

In No. 23-6132, we deny any motion Sanchez intended to bring by way of his opening brief, and we affirm the district court. The mandate shall issue forthwith.[6]

In No. 23-6137, we deny authorization to file a successive § 2254 petition. This denial "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). We deny the stay motion as moot.

Entered for the Court
Per Curiam

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stay—we deny that motion for the same reasons as the district court. Sanchez's arguments are no less speculative or dilatory here than in the district court.

[6] In an abundance of caution, the disposition of No. 23-6132 was circulated to all active judges of this court prior to issuance. No judge requested a poll on the questions presented by Sanchez. Thus, no en banc consideration is warranted or available.